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Supreme Court, U.S.
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No. 07-18

In The

Supreme Court of the United States

JOHN A. WHITAKER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that "testimonial" hearsay statements violate the Confrontation Clause of the Sixth Amendment. Is a statement admitted under Washington's hearsay exception for co-conspirator statements testimonial if it describes the facts of a completed crime allegedly committed by the defendant?

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State v. Whitaker, No. 54834-4-I, 133 Wash. App. 199, 135 P.3d 923 (2006), *review denied*, No. 78969-0, 159 Wash. 2d 1017, 157 P.3d 404 (April 4, 2007). App. 1-38; App. 63.

V. BASIS FOR JURISDICTION

This petition is timely filed within 90 days of the Washington Supreme Court's denial of review. *See* Supreme Court Rules 13.1 and 29.2. This Court has jurisdiction under 28 U.S.C. § 1257.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in part:

  > In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

- The Fourteenth Amendment to the United States Constitution provides in part:

  > . . . nor shall any state deprive any person of life, liberty, or property without due process of law.

VII. STATEMENT OF THE CASE

John Whitaker was charged in Snohomish County Superior Court with aggravated first degree murder and convicted following a jury trial. He was sentenced to life in prison without the possibility of parole.

The charges stemmed from the kidnapping and murder of Rachel Burkheimer. By all accounts John Anderson was the actual killer, although several others were present when Burkheimer was assaulted, restrained, transported to a remote location, and ultimately killed and buried. Mr. Whitaker was convicted on a theory of accomplice liability.

Whitaker testified that he stayed with the group during these events because he was terrified of Anderson, who punched him in the face at one point and was armed with a gun throughout. Whitaker maintained that he tried to talk Anderson out of killing Burkheimer. The State's case was based in part on the out-of-court statements of Yusef Jihad to Maurice Rivas. At trial, Rivas testified that Jihad told him, among other things, that Whitaker kicked Burkheimer and helped to tie her up. The trial court admitted these statements under Washington Rule of Evidence 801(d)(2)(v), which excludes from the definition of hearsay statements offered against a party and made by a co-conspirator of that party "during the course and in furtherance of the conspiracy." Whitaker challenged this ruling in the trial court and on appeal on Sixth Amendment grounds.

The Washington Court of Appeals recognized that testimonial hearsay statements violate the Confrontation Clause in view of *Crawford v. Washington*, 541 U.S. 36 (2004). It believed, however, that the *Crawford* court had

categorically excluded co-conspirator statements from the definition of "testimonial." App. 25-26, citing *Crawford*, 541 U.S. at 56.

The Washington Court of Appeals also believed that any error concerning the admissibility of Jihad's out-of-court statement was harmless because it was "merely duplicative of what Williams and White said." App. 25. The statements of those witnesses, however, were highly suspect. Williams admittedly gave several prior statements to the police, under oath, in which he denied that Whitaker was involved in assaulting and restraining Burkheimer. He did not incriminate Whitaker until he began cooperating with the prosecution as part of a successful effort to plead to reduced charges. White was a "jailhouse snitch" who revealed statements Whitaker supposedly made to him in exchange for a reduction of his own charges. Another jail inmate testified that he saw White going through Whitaker's legal papers prior to White contacting the police. White told the police at one point that he had been diagnosed with schizophrenia and bipolar affective disorder. Thus, the jury would most likely have discounted the testimony of White and Williams had it not been corroborated by the out-of-court statements of Jihad, who had no apparent motivation to lie when speaking with Rivas.

VIII. REASONS FOR GRANTING THE WRIT

A. SUMMARY OF ARGUMENT

Supreme Court Rule 10 indicates that certiorari is appropriate in the following situations:

> (b) a state court of last resort has decided an important federal question in a way that conflicts

> with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10(b) is satisfied here because the Washington court's categorical rule that the Confrontation Clause does not apply to co-conspirator statements conflicts with the Second Circuit's position that some co-conspirator statements are "testimonial" and therefore subject to the right of confrontation. *See United States v. Stewart*, 433 F.3d 273, 292 (2d Cir. 2006); *United States v. Logan*, 419 F.3d 172, 178-79 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1067 (2006).

Rule 10(c) is satisfied because the Washington court's reasoning in this case conflicts with that of this Court in *Crawford v. Washington* and *Davis v. Washington*, — U.S. —, 126 S. Ct. 2266 (2006). In the alternative, if the Court finds the issue to be unsettled, it should resolve this important question of federal law.

B. THE WASHINGTON COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

The Sixth Amendment's Confrontation Clause "ensur[es] that convictions will not be based on the charges of unseen . . . – and hence unchallengeable – individuals." *Lee v. Illinois*, 476 U.S. 530, 540 (1986). This Court thus held in *Crawford v. Washington*, that when a person has made an out-of-court statement as a "witness" – that is,

"[w]here *testimonial* evidence is at issue" – "the Sixth Amendment demands what the common law required: unavailability and a *prior opportunity for cross-examination*." 541 U.S. at 68 (emphasis added). Whitaker never had a chance to cross-examine Jihad regarding his out-of-court statements to Rivas. So to the extent that these statements that the trial court admitted were testimonial, the court violated Whitaker's Sixth Amendment rights.

Crawford declined to lay down a "comprehensive" definition of testimonial. 541 U.S. at 68. "Whatever else the term covers," the Court noted, "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations." *Id.* These types of reportorial statements are categorically different from "a casual remark to an acquaintance." *Id.* at 51.

But in *Davis v. Washington*, 126 S. Ct. 2266 (2006), this Court refined the testimonial concept in a manner directly relevant here. Addressing one alleged victim's 911 call and another's statement to responding police officers, the Court explained that the key to identifying whether an out-of-court statement is testimonial is whether the statement amounts to "a weaker substitute for live testimony at trial." 126 S. Ct. at 2277. When "the ex parte actors and the evidentiary products of the ex parte communication align[] perfectly with their courtroom analogues," statements are testimonial. *Id.* Thus, a 911 call seeking help in the midst of an ongoing attack is not testimonial because "[n]o 'witness' goes into court to proclaim an emergency and seek help." *Id.* On the other hand, statements that "deliberately recount[], in response to police questioning, how potentially criminal events

began and progressed" are testimonial "because they do precisely *what a witness does* on direct examination." *Id.* at 2278.

Jihad's statements to Rivas satisfy this test. The statements recounted "how potentially criminal events began and progressed." *Id.* It makes no difference whether Jihad's statements were volunteered or given in response to specific questions. "The Framers [of the Sixth Amendment] were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers from detailed interrogation. . . . [I]t is in the final analysis the declarant's statements, not [any] interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 2274 n.1.

Nor should it matter that Jihad's statements were made to a private party rather than to the police. In *Davis*, this Court discussed an English common law case, *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), in which a prosecutor introduced statements a young girl made to her mother upon returning home describing an alleged assault. *See Davis,* 126 S. Ct. at 2277. The King's Bench held that introducing the statements violated the defendant's right to confrontation because the girl did not testify at trial, and the Supreme Court in *Davis* accepted this result, saying it "would [have been] helpful to Davis" if it were closer to the facts in his case. *Id.* After *Davis*, therefore, it is clear that statements made to family and friends are testimonial when they recount possibly criminal events.

This result makes perfect sense. While "casual" remarks to family members fall outside of the ambit of the Confrontation Clause, *Crawford*, 541 U.S. at 51, statements

describing criminal actions are hardly casually made; such statements are serious business. And using such statements at trial – just like statements to law enforcement officers – "align[] perfectly with their courtroom analogues." *Davis*, 126 S. Ct. at 2277. They recount past events and prejudice defendants by presenting an *ex parte* version of incriminating events that the defendant is powerless to challenge. This is the very evil the Confrontation Clause – which, after all, developed before professional police forces even existed, *see Crawford*, 541 U.S. at 53 – is designed to prevent. *See id.* at 50.

The Washington Court of Appeals incorrectly cited *Crawford* for the proposition that co-conspirator statements can *never* be testimonial. The only discussion of the issue by the *Crawford* majority is as follows:

> But there is scant evidence that [historical] exceptions [to the hearsay rule] were invoked to admit testimonial statements against the accused in a criminal case. Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or *statements in furtherance of a conspiracy*. We do not infer from these that the Framers thought exceptions would apply even to prior testimony.

Crawford, 541 U.S. at 56 (emphasis added). This *dictum* was certainly not necessary for the Court's decision since *Crawford* did not itself involve statements admitted under a co-conspirator exception. The Court's offhand comment was no doubt correct in regard to typical co-conspirator statements. For example, discussions concerning the planning of a crime or orders barked during the commission of it are clearly not testimonial.

Here, however, the Washington courts used a co-conspirator exception to admit statements that accused the defendant of perpetrating the completed crimes of assault and unlawful imprisonment. Such statements do not lose their testimonial nature simply because the speaker is arguably involved in a conspiracy with the defendant.

C. THE WASHINGTON COURT'S ANALYSIS CONFLICTS WITH DECISIONS OF THE SECOND CIRCUIT

The Second Circuit has recognized that co-conspirator statements may be "testimonial" under the *Crawford* analysis. In *United States v. Logan*, the alibi statements of two conspirators were "in furtherance of the conspiracy" and "were also testimonial." *Id.*, 419 F.3d at 178. Their admission did not violate the Confrontation Clause, however, because they were not offered for the truth of the matter asserted, but rather to confirm that a particular *false* alibi was part of the group's plan. *Id.* at 177-78. Similarly, in *United States v. Stewart*, 433 F.3d 273, 292 (2d Cir. 2006) the court noted that "Crawford had no occasion to consider the situation we face: statements that are both in furtherance of a conspiracy and testimonial." In *Stewart*, however, the very object of the conspiracy was to make the statements at issue so as to obstruct an investigation. Because the statements were not offered for the truth of the matter asserted they did not violate the Confrontation Clause. *Id.* at 292.

Here, however, Jihad's statements were clearly offered to prove the truth of the matter asserted, that is, that Whitaker really did assault and restrain Burkheimer. Under the Second Circuit's reasoning, these statements are testimonial and subject to the Confrontation Clause.

Thus, there is a clear conflict between the Second Circuit and the Washington courts, which this Court should resolve.

VIII. CONCLUSION

For the reasons stated, this Court should grant the writ of certiorari and decide whether coconspirator statements can be subject to the Confrontation Clause.

RESPECTFULLY SUBMITTED this 29th day of June, 2007.

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135 P.3d 923

Court of Appeals of Washington, Division 1.
STATE of Washington,
Respondent/Cross-Appellant,

v.

John A. WHITAKER, Appellant/Cross-Respondent.
No. 54834-4-I.

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Cross-Appellant.

BECKER, J.

¶ 1 John Whitaker was convicted of aggravated murder and conspiracy to commit first degree murder. He was convicted for his participation in the kidnapping and killing of Rachel Burkheimer in Snohomish County, and sentenced to life in prison without the possibility of parole.

¶ 2 With respect to the primary issues he raises on appeal, we hold that despite extensive local publicity about the murder, no change of venue was called for; Whitaker upon arrest was properly advised of his right to counsel before he gave an incriminating statement; the trial court did not err in admitting an out of court statement by a coconspirator; and Whitaker did not preserve his claim

that the "major participant" language in the aggravating factor instructions needed further definition. Whitaker had a fair trial, and we affirm his conviction and sentence.

FACTS

¶ 3 According to the State's evidence, John Whitaker helped his friend John Anderson and several others kidnap and kill Anderson's ex-girlfriend, Rachel Burkheimer, in September 2002. Whitaker helped to bind, hide, and transport Burkheimer. He helped to dig her grave, rob her, bury her, and destroy evidence of her murder.

¶ 4 Anderson and Whitaker were part of a group who called themselves the Northwest Mafia. The group, led by Yusef Jihad and Anderson, made money by selling drugs and robbing people. Whitaker was third in command, followed by Matthew Durham, Maurice Rivas, Tony Williams, and Matt Barth. Jihad made it clear that disloyalty to the group would be met with violence.

¶ 5 At one time, Whitaker and Anderson had lived with J.J. Brazwell. Brazwell moved out and then began dating Burkheimer. Anderson, her ex-boyfriend, was angry and jealous. Anderson and his friends decided that Brazwell was their enemy.

¶ 6 Burkheimer was still associating with members of the group. Word eventually reached Anderson and Jihad that Burkheimer was discussing the group's criminal activity with Brazwell and others. A day before she disappeared, Burkheimer invited Anderson and Jihad to a party. They became convinced that Burkheimer had tried to lure them to the party so Brazwell could kill them.

¶ 7 Jihad and Anderson decided to confront Burkheimer. The next day, they learned that she was with two of the group's members, Durham and Rivas, at another friend's house. They ordered Durham and Rivas to bring Burkheimer to the duplex where Jihad, Anderson, Whitaker and several of the others were staying. Burkheimer came willingly.

¶ 8 When Burkheimer arrived at the duplex, Anderson became angry. He punched Whitaker and Barth, who were laughing with Burkheimer. This nearly provoked a gunfight with Barth. Burkheimer tried to leave. Anderson threw her to the ground and punched her. Other members of the group turned up the music volume to drown out Burkheimer's screams. Whitaker helped to bind her feet, hands, and mouth with duct tape. He kicked her. Whitaker and Anderson carried Burkheimer into a freestanding garage next to the duplex.

¶ 9 The group held Burkheimer in the garage, bound, while various members of the group used cocaine and marijuana and discussed what to do with her. They considered ransoming her. Jihad said they should kill her, pointing his gun at her. Jihad threatened the others that "Loose ends get cut off", and told Durham and Rivas they could not leave. This went on for several hours.

¶ 10 The group was startled into action when Jihad's girlfriend Trissa Conner – who owned the duplex – came home. She demanded to be let into the garage. When eventually let in, Conner tried to free Burkheimer. After Anderson forced Conner to leave the garage, she threatened to call the police. Jihad convinced her not to do so. Back in the duplex, Conner ordered the group to leave. Two of the men left.

¶ 11 Anderson was still trying to decide what to do with Burkheimer. In earshot of Whitaker, Anderson said he could not strangle Burkheimer because he used to love her. Whitaker, Barth, and Jihad discussed planting Burkheimer's car at Brazwell's home. Whitaker then grabbed a large duffle bag and removed its contents. He took the bag into the garage. Someone forced Burkheimer into the bag, and Anderson and Whitaker carried the bag to Durham's Jeep.

¶ 12 Durham, Rivas, and Whitaker filled Durham's Jeep with gas and drove off, with Burkheimer still inside the duffel bag. Whitaker directed them where to go, following instructions he received over the telephone from Anderson and Jihad. They drove to a wooded area, offloaded the bag, and left Rivas there to watch Burkheimer while they went back to pick up Anderson. Rivas unzipped the bag and spoke with her. Convinced the men would kill her, Burkheimer asked Rivas to make sure they did not drown her.

¶ 13 When Whitaker and Durham returned with Anderson, they brought shovels and picks from the duplex. Durham drove the Jeep to a remote gravel pit east of Gold Bar. On Anderson's orders, Rivas, Whitaker and Anderson dug a shallow hole. They brought Burkheimer to the hole. Anderson ordered her to disrobe, to remove her jewelry, and get into the hole. Whitaker collected her belongings, Anderson shot Burkheimer several times, killing her.

¶ 14 Whitaker, Anderson, and Rivas buried the body. They returned to the duplex and left Anderson there. Anderson ordered them to get rid of the gun and Burkheimer's things. Whitaker, Rivas and Durham parked Burkheimer's car at Brazwell's house. Rivas and Durham

dropped Whitaker off, then disposed of the other evidence in the car. Whitaker helped several of the others to clean the duplex. They burned a carpet they believed had evidence of the attack. They discussed alibis and leaving town.

¶ 15 The investigation into Burkheimer's disappearance eventually led to the duplex. Whitaker, Barth, and Jihad began living in hotels, then left for California. They were arrested in Los Angeles. Whitaker made incriminating statements to two FBI agents and later to a jail informant, Christian White.

¶ 16 The State charged Whitaker with aggravated first degree murder and conspiracy to commit murder. The State also charged seven of the other men involved, five of whom pleaded guilty. Whitaker's was the final case to go to trial. He testified at his trial and claimed his actions were motivated solely by fear of Anderson. He denied kicking or binding Burkheimer and denied directing Durham and Rivas where to go once they left with Burkheimer in the bag. He said he tried to convince the men several times to let Burkheimer go. He said he tried to leave the murder site but was ordered to stay by Anderson, who was armed. He was too upset to help bury the body. A jury found Whitaker guilty as charged. He appeals the conviction and sentence.

MOTION TO CHANGE VENUE

¶ 17 Whitaker moved for a change of venue. He argued that it would be impossible to seat an impartial jury in Snohomish County because of inflammatory pretrial publicity.

¶ 18 The State contends Whitaker failed to preserve this issue because after initially making the motion, he did not renew it. However, the trial court raised the issue again sua sponte just before opening statements. The court mentioned that the motion was still pending, and denied it. We conclude the issue was adequately preserved for review.

¶ 19 Due process requires that the accused receive a trial by an impartial jury free from outside influences, including prejudicial publicity. *Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

¶ 20 When a defendant shows that pretrial publicity has created a probability of unfairness or prejudice, a presumption arises that courts should reject claims by potential jurors that they can be impartial. Courts must examine the totality of the circumstances to determine whether such a presumption arises. The relevant question is not whether the community remembered the case, but whether the jurors at the trial had such fixed opinions that they could not judge impartially the guilt of the defendant. *Jackson,* 150 Wash.2d at 269, 76 P.3d 217. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751, (1961). The decision to grant or deny a venue motion is reviewed for abuse of discretion. *State v. Jackson,* 150 Wash.2d 251, 269, 76 P.3d 217 (2003).

¶ 21 In *Irvin,* a "pattern of deep and bitter prejudice" was shown to be present throughout the Indiana community, which was "clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box." *Irvin,* 366 U.S. at 727, 81 S.Ct.

1639. Before the trial began, eight out of Irvin's 12 jurors already thought he was guilty, although each juror seated promised to "be fair and impartial." The Supreme Court reversed the conviction. "Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Irvin,* 366 U.S. at 728, 81 S.Ct. 1639. Whitaker contends that the trial court here likewise failed to apprehend a probability of prejudice from the pretrial publicity.

¶ 22 Appellate courts must independently review the record to determine whether the probability of prejudice is so apparent that it constitutes error to deny the motion for a change of venue. *State v. Thompson,* 60 Wash.App. 662, 669, 806 P.2d 1251 (1991). Appellate courts examine nine nonexclusive factors to determine whether the trial court abused its discretion:

> (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

State v. Crudup, 11 Wash.App. 583, 587, 524 P.2d 479 (1974). Because each case is factually unique, previous cases applying the factors are helpful but not dispositive. *State v. Rice,* 120 Wash.2d 549, 556, 844 P.2d 416 (1993).

¶ 23 Whitaker contends the court failed to give enough weight to the factors that favored a change of venue. He relies on factors (1) inflammatory nature, (2) degree of circulation, (3) timing of publicity, and (7) connection of government officials.

¶ 24 The trial court agreed with Whitaker that factors two and three – the widespread circulation of the news accounts, and the short period of time between the publicity and trial – weighed in support of the motion to change venue. With respect to the seventh factor, the court found no significant connection of State's agents with the release of the publicity. Most of the accounts were based on generally available information. Whitaker cites statements police gave to news media during the investigation and interviews given by prosecutors. But he has not shown that any such statements or interviews were inflammatory rather than informational. Whitaker places great emphasis upon the county prosecuting attorney's comment, reported in the newspaper, that the case "touched a nerve" in the community. This phrase was circumspect, not inflammatory. The trial court correctly concluded that the involvement of state agents with pretrial publicity was insufficient to weigh in support a venue change.

¶ 25 With respect to the first factor, the trial court concluded that the pre-trial publicity was "informational and not inflammatory in nature," and that the "nature and circumstances of the crime are the cause of public interest, not the nature of the publicity." The record shows that this was true for the most part, but Whitaker is correct that some of the pretrial publicity went beyond merely providing information. Two newspaper editorials lamented the senselessness of the murder; other articles detailed the grief and frustration experienced by Burkheimer's family;

still others showed Whitaker's attempt to get one of the witnesses disqualified by claiming he was married to her, a claim the court ultimately rejected.

¶ 26 However, as set out in *Jackson*, the relevant question is not simply the existence of inflammatory publicity, but rather the effect of that publicity upon potential jurors. In *Jackson*, the Washington Supreme Court emphasized the importance of the trial court's care in empaneling a jury:

> although the publicity was at times extensive, and some of it inflammatory, and the great majority of the veniremen had heard of the case, the care taken by the trial court to ensure an impartial panel leads us to conclude that the Court of Appeals correctly found no abuse of discretion.

Jackson, 150 Wash.2d at 270, 76 P.3d 217. The best way to find out if the jurors have opinions so fixed that they cannot be impartial is to attempt to empanel a jury. In *Jackson,* the court found it significant that Jackson had been given the opportunity for in camera questioning of each prospective juror. On appeal, Jackson had not identified "any specific members of the seated jury or the alternates as being biased". *Jackson,* 150 Wash.2d at 272, 76 P.3d 217.

¶ 27 *Jackson* shows that a trial court's extreme care in selecting a jury can prevent inflammatory publicity from being a concern. Like in *Jackson,* Whitaker's trial judge took great care to ensure an impartial jury. One hundred and five potential jurors were in the pool at the beginning. Before personally interviewing any of them, the judge warned the group at length, and more than once, about the unreliability of media accounts, *e.g.*:

> Please keep in mind that media reports are based on hearsay sources, and not upon firsthand interviews with witnesses under oath; that media reports are not tested by the presumption of innocence standard, or proof beyond a reasonable doubt standard; and that media reports generally make no distinction between the eight men charged with this crime. You don't necessarily know whether what you have seen, read or heard relates to Mr. Whitaker or to one of the other men accused in this crime.[1]

Eighty-three potential jurors underwent in camera questioning based on their answers to the jury questionnaire.

¶ 28 After personally interviewing jurors, the court found that the jurors were aware of the death but not of Whitaker's involvement in it:

> A large number of the prospective jurors were familiar with the case. However, many knew little more than that a young woman had been missing and later found dead. In general, the prospective jurors did not know John Whitaker's name or how he related to the case.

The court granted all but two of Whitaker's for-cause challenges. Whitaker was able to exercise peremptory [sic] challenges for both of those jurors.

¶ 29 The record reflects that Whitaker's prospective jurors had little awareness of the publicity and the details of the crime. Given the scrupulous care taken by the trial court, the circumstances considered in their totality do not show a probability of unfair prejudice sufficient to raise

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[1] Report of Proceedings (5/25/04) at 10.

the presumption that the jurors' declarations of impartiality should be distrusted. The trial court did not abuse its discretion in denying the motion for change of venue.

STATEMENT TO FBI AGENTS

¶ 30 In Los Angeles, two FBI agents conducted a custodial interrogation of Whitaker after obtaining his waiver of his right to remain silent and to have an attorney. Whitaker contends his waivers were invalid because they were coerced, and the incriminating statements he made during the interrogation should therefore have been suppressed. As Whitaker describes the scene, he "was a young man in an intimidating setting in Los Angeles: he was handcuffed, he was being held in the Sheriff's Department detective bureau, and he was being interrogated by veteran FBI agents."

¶ 31 Whitaker assigns error to the order entered by the trial court after a CrR 3.5 hearing. Because he does not assign error to the findings, they are verities on appeal. *State v. Earls,* 116 Wash.2d 364, 372 n. 3, 805 P.2d 211 (1991). The trial court found that a Snohomish County arrest warrant was issued for Whitaker while he was in California. A Snohomish County detective asked FBI agents in Los Angeles to help find and arrest Whitaker. Two FBI agents were present when the Los Angeles County Sheriff's office arrested Whitaker on the warrant. At the request of the County detective, the FBI agents interviewed Whitaker two hours later at the Sheriff's Office in an interview room.

¶ 32 Whitaker was handcuffed during the interview, although the agents removed the handcuffs from one hand so Whitaker could write. The agents explained why they

were there, told Whitaker the charges he faced, and told him where those charges were filed. They explained the extradition process and informed Whitaker about his constitutional rights.

¶ 33 Whitaker waived his rights and signed a waiver form. He wrote a statement and gave oral statements. In these statements he admitted that he may have helped to place Burkheimer in the bag, to carry her in the bag to the truck, to dig her grave, and to bury the body. He reviewed his written statement and made some changes.

¶ 34 Both the Fifth and Sixth amendments to the federal constitution (and their State counterparts) include guarantees of the right to counsel. The Fifth Amendment prohibition against compelled self-incrimination requires that custodial interrogation be preceded by advice to the accused that he has the right to remain silent and the right to the presence of an attorney. *Miranda v. Arizona,* 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). However, the person being interrogated may validly waive the right to counsel. *Miranda,* 384 U.S. at 475, 86 S.Ct. 1602. If the interrogation takes place without an attorney present, the State has the heavy burden of establishing the defendant's waiver of his privilege against self-incrimination and his right to retained or appointed counsel. This burden is met if the State can prove the voluntariness of the statement by a preponderance of the evidence. *State v. Earls,* 116 Wash.2d 364, 378-79, 805 P.2d 211 (1991).

¶ 35 To be valid, the Fifth and Sixth Amendment waivers must be voluntary, knowing, and intelligent. *Edwards v. Arizona,* 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (Fifth Amendment); *Patterson v.*

Illinois, 487 U.S. 285, 292, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth Amendment). Validity of a waiver depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Edwards,* 451 U.S. at 482, 101 S.Ct. 1880. Absent coercion, a suspect's Fifth Amendment waiver is valid as a matter of law when the State shows he knew he could remain silent and request an attorney, and he understood that the State could use his statements against him. *State v. Corn,* 95 Wash.App. 41, 59, 975 P.2d 520 (1999). The same analysis applies with respect to a waiver of the Sixth Amendment right. *See Patterson,* 487 U.S. at 292-93, 108 S.Ct. 2389.

¶ 36 Whitaker both signed and wrote statements indicating he understood his rights. He reviewed his written statements and made some changes. While he was writing the statements, the agents were in and out of the interview room. Whitaker appeared awake, alert, and sober. He asked questions about the extent of his rights, and was neither threatened nor promised anything in exchange for his waiver.

¶ 37 Whitaker had at least one hand handcuffed during the interview. But as the trial court concluded, that fact did not establish coercion per se. And Whitaker was not so young at age 22 as to be incapable of waiving his rights. *See State v. Jones,* 95 Wash.2d 616, 625, 628 P.2d 472 (1981). There, a 15 year-old Canadian boy who was charged with second-degree murder waived his *Miranda* rights and gave a custodial statement. The boy testified he had only once visited this country, had dropped out of high school in the 10th grade, and did not understand the rights read to him. However, he had signed an appropriate waiver form, appeared of normal intelligence and

understanding, and his answers were responsive to the interrogator's questions. The *Jones* court affirmed the trial judge's ruling that the boy understood his rights. Similarly here, Whitaker's youth is not a basis to discount the trial court's determination that he was capable of waiving his rights.

¶ 38 Whitaker also contends the FBI agents "affirmatively misrepresented" his right to counsel. At some point during the time the agents were advising Whitaker of his rights, he asked "when he could talk to an attorney." The agents asked Whitaker whether he had an attorney or he would need an appointed attorney. Whitaker replied that he was talking about "when in the process an attorney would be appointed" for him.

¶ 39 The agents told Whitaker the court "would deal with this" when he went to court the next morning. Whitaker contends this was the misrepresentation. If this had been the agents' only response to his inquiry, we might agree. But the agents also told Whitaker he could request an attorney "at that moment." They clearly stated that if he asked for an attorney all questioning would stop. Whitaker chose not to ask for an attorney, and instead waived his rights. After the colloquy reflected in the court's findings, Whitaker could not have reasonably believed that he did not have the right to counsel at that moment. We find no error in the trial court's conclusion that Whitaker's waivers of his Fifth and Sixth Amendment rights were voluntary, knowing, and intelligent.

¶ 40 Whitaker finally argues that the agents deprived him of his right to counsel by violating a court rule. The rule in question provides:

> At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1(c)(2). Whitaker contends this rule applies to federal agents in California by virtue of an alleged agency relationship between the Snohomish County detective and the FBI interrogators. Assuming the rule does apply, we conclude the FBI interrogators did not violate it. The rule applies only to a person "who desires a lawyer". The court's findings make clear that Whitaker did not express a desire to have a lawyer on hand before or during the interrogation. He asked a question about the process by which a lawyer would be appointed.

¶ 41 Whitaker's question might have been understood as an equivocal invocation of his right to counsel. When an invocation is equivocal, interrogators are generally allowed to ask questions clarifying the suspect's request. *See State v. Robtoy,* 98 Wash.2d 30, 38, 39, 653 P.2d 284 (1982) ("Otherwise, the mere mention by the suspect of the word 'attorney' takes on talismanic significance."). The agents sought to clarify Whitaker's question by explaining that he could ask for an attorney any time and if he did so, all interrogation would stop. Because Whitaker did not respond to that offer, he made it clear that he was willing to be questioned without invoking his right to communicate with a lawyer. We conclude there was no violation of CrR 3.1(c)(2).

¶ 42 Because Whitaker validly waived his constitutional rights, the court properly ruled his statements admissible.

CHRISTIAN WHITE'S TESTIMONY

¶ 43 At trial, over Whitaker's objection, the court allowed jail informant Christian White to testify about conversations he had with Whitaker when they were housed in neighboring cells at the jail. According to White, Whitaker told him he had kicked Burkheimer in the head just after Anderson first attacked her. According to White, Whitaker also said he did not try to stop Anderson from shooting Burkheimer because he wanted to see what it was like to see someone murdered. White said Whitaker told him he was going to claim at trial that he was afraid of Anderson on the day in question, and would try to convince his codefendants to lie at trial to the same effect.

¶ 44 Whitaker contends the State made White an agent for the purpose of getting incriminating statements from Whitaker without counsel being present. Therefore, he contends, admission of White's testimony violated his Sixth Amendment right to counsel.

¶ 45 The prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the Sixth Amendment right to counsel. *Maine v. Moulton,* 474 U.S. 159, 171, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. *Moulton,* 474 U.S. at 176, 106 S.Ct. 477. Knowing exploitation by the State of an opportunity to confront the accused without counsel being present violates the right to counsel. *Moulton,* 474 U.S. at 176, 106 S.Ct. 477.

¶ 46 The fact that an inmate has an existing relationship with law enforcement, has previously been an

informant, or has received some benefit for reporting a defendant's statements may be evidence of his status as a government agent. *In re Benn,* 134 Wash.2d 868, 911, 952 P.2d 116 (1998). But none of these factors is dispositive. The informant's understanding from past conduct as an informant that cooperation with the authorities may prove beneficial does not necessarily make the informant an agent. For there to be an agency relationship, there must be at least an implicit agreement between the parties with respect to the current undertaking, and the principal must have the ability to control that undertaking. *Benn,* 134 Wash.2d at 912, 952 P.2d 116.

¶ 47 After Whitaker moved to suppress information gained from White, the court conducted a hearing to decide whether White was a state agent. In deciding that he was not, the court relied on testimony by Detective Pince and transcripts of Pince's interviews with White.

¶ 48 Detective Pince testified that White was housed next to Whitaker at the jail while awaiting trial on third degree assault charges. White had known Whitaker for years, and befriended him in jail by protecting him. White had approached another officer, seeking to give information about the Burkheimer case and another case. The officer referred White to Detective Pince. On February 7, 2004, White met with Detective Pince to tell him things he had heard about two cases, one of which was Whitaker's. During this first meeting, White told the detective much of what he testified to at Whitaker's trial. White hoped to get favorable consideration from the prosecutor's office. He offered to get more information, but Detective Pince told him not to try. Detective Pince told White he would present the information to the prosecutor's office, who would decide whether a deal could be worked out.

¶ 49 Later, White sent a letter to Detective Pince indicating he had more information. He said he knew he was not supposed to be looking for information, but he accepted it freely when it came to him. He concluded by mentioning his upcoming trial date and asking what Detective Pince's plan was. After receiving this letter, Detective Pince and a prosecuting attorney met with White again on February 26. At the interview, White said Whitaker was arranging with one of his codefendants to testify falsely that Whitaker was afraid of Anderson. White acknowledged there had been no agreement between him and the State to get more information, and that he had been told not to do so. White admitted, though, that once Whitaker began telling him things, White encouraged him to say more. Detective Pince testified that this information had caused him to reinterview Maurice Rivas, who testified at trial that he was contacted by Whitaker through another person with instructions on how to testify.

¶ 50 Detective Pince testified that he had no implied agreement with White. At their first meeting on February 7, White told him he hoped to be released from jail pending his trial in exchange for the information. This hope went unfulfilled. Detective Pince said he stressed to White that the reason he was recording the February 7 statement was because he did not want any more information from White other than what he had already received at that meeting. Detective Pince testified that logistical problems and time constraints prevented him from having White moved to another cell. He said the jail was overwhelmed with the Burkheimer case because so many people already needed to be kept separate.

¶ 51 Whitaker withdrew his motion to exclude information collected from the February 7 interview with White, acknowledging there was no evidence White was an agent at that time. However, he argued the court should exclude the fruits of White's second interview: evidence that Whitaker was trying to convince Rivas to lie on his behalf. The court found no implicit agreement:

> it would have been best if Detective Pince had arranged at that time for Mr. White to be moved to a different housing unit in the Snohomish County Jail so he would not have been able to have further contact with Mr. Whitaker. However, even though this was not done there is no evidence to suggest that the failure was because of some hope or intention that Mr. White would continue to try to get information from Mr. Whitaker. There's nothing to suggest that Detective Pince was in any way trying to undermine or suggest that his plain language, indicating that Mr. White was to do nothing more, meant anything other than exactly what he was saying. As I said, it's unfortunate that Detective Pince didn't have the opportunity right then to make arrangements. I think it's clear from Detective Pince's own testimony that he would have preferred to have done something immediately, in retrospect.
>
> . . . . I'm also persuaded by the testimony that Mr. White did not make any actual effort to obtain that information.

The court denied the motion to suppress the fruits of White's second interview.

¶ 52 Proof that the State "must have known" that its agent was likely to obtain incriminating statements from

the accused in the absence of counsel suffices to show a Sixth Amendment violation. *United States v. Henry,* 447 U.S. 264, 271, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). Whitaker contends White was a state agent because the State, like in Henry, must have known that White would seek out more information from Whitaker.

¶ 53 In *Henry,* a defendant was incarcerated pretrial on a bank robbery charge. Nichols, a regular government informant, was incarcerated near Henry. An agent told Nichols to be alert to anything Henry (and others) said, but not to initiate any conversation with Henry regarding the bank robbery. The agent later contacted Nichols, who said he and Henry had spoken about the robbery. The FBI paid Nichols for the information, and Nichols testified at Henry's trial about what Henry told him. Henry's conviction was reversed on appeal based on the violation of his Sixth Amendment right to counsel. The Court set out three important factors leading to this conclusion: (1) Nichols was acting under instructions as a paid government informant; (2) Nichols was ostensibly no more than a fellow inmate of Henry; and (3) Henry was in custody and under indictment at the time he was engaged in conversation by Nichols. "Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." *Henry,* 447 U.S. at 271, 100 S.Ct. 2183. The Court was untroubled, however, by the testimony of another of Henry's cellmates, who was not a paid informant and had no arrangement to monitor or report on conversations with Henry. *Henry,* 447 U.S. at 267 n. 3, 100 S.Ct. 2183.

¶ 54 The paid informant in Henry had been told to listen to everything Henry said, and was paid according to an existing agreement. White, by contrast, was told not to seek out information and was promised nothing (though he eventually made a plea deal). The court believed Detective Pince's explanation for why White was not moved to a different area in the jail. The trial court's conclusion that Detective Pince acted in good faith is supported by the hearing testimony. Moreover, like in *Benn,* there was neither an implicit agreement nor any evidence that Detective Pince could control White. White directly contradicted Detective Pince's instructions. Whitaker's arguments to the contrary are essentially invitations to revisit the trial court's credibility determinations. This we cannot do.

COCONSPIRATOR STATEMENTS

Whitaker contends certain out-of-court statements by Jihad and Anderson should not have been admitted because they were hearsay. The State responds they were not hearsay and were properly admitted as statements by coconspirators.

¶ 55 An out of court assertion offered for the truth of the matter asserted is not hearsay if offered against a party and made by a coconspirator of that party "during the course and in furtherance of the conspiracy." ER 801(d)(2)(v). Before admitting statements under this rule, the trial court must make an independent determination that a conspiracy existed and that the defendant was a member of the conspiracy. *State v. Halley,* 77 Wash.App. 149, 152, 890 P.2d 511 (1995). Both must be shown by substantial evidence independent of the statements the

State seeks to admit, and must be established by a preponderance of the evidence. *State v. St. Pierre,* 111 Wash.2d 105, 118, 759 P.2d 383 (1988).

¶ 56 The State need show no more than the basic dictionary definition of a conspiracy: "'an agreement . . . made by two or more persons confederating to do an unlawful act'", regardless of the crime charged. *Halley,* 77 Wash.App. at 154, 890 P.2d 511 (quoting Webster's Third New International Dictionary 485 (1969)). A conspiracy may be shown by circumstantial evidence. It is not necessary to show a formal agreement. A concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose, will suffice. *State v. Barnes,* 85 Wash.App. 638, 664, 932 P.2d 669 (1997).

¶ 57 Whitaker moved in limine to exclude coconspirator hearsay. He argued that the State would be unable to establish the necessary foundation. The court reserved ruling until trial, and asked the prosecutor to come up with a list of the statements for which he believed the coconspirator exception was necessary for admission.

¶ 58 At trial, several members of the group testified as to what happened to Burkheimer in the duplex. At one point, during Rivas's direct examination, the prosecutor indicated he sought to use the coconspirator exception to elicit from Rivas two damaging statements by Jihad, who along with Anderson was unavailable at trial. Whitaker objected strongly to the admission of one statement, which Jihad made when Rivas arrived at the duplex and saw what was going on in the garage. Jihad told Rivas he was "in this now", and told him also (among other things) that Whitaker had kicked Burkheimer. After hearing extensive

argument, the trial court found the statement was not hearsay because Jihad was Whitaker's coconspirator.

¶ 59 A court's evidentiary rulings are reviewed for abuse of discretion. *State v. Davis,* 141 Wash.2d 798, 841, 10 P.3d 977 (2000). Whitaker contends the record does not contain substantial evidence to establish independently that at the time Rivas arrived at the duplex, a conspiracy existed and Whitaker was a member of it.

¶ 60 The court identified the following evidence as constituting the necessary foundation: (1) Anderson knocked Burkheimer down in the presence of several other people, including Whitaker, (2) Whitaker kicked her, (3) Williams turned up the music and got duct tape, (4) Whitaker assisted in taping Burkheimer, (5) Burkheimer was carried into the garage, (6) the individuals who were present were in and out of the garage, and (7) they all discussed what to do next. These facts are all supported by firsthand non-hearsay testimony at trial, all of it admitted into evidence before the hearing on Whitaker's motion to exclude. Christian White's testimony, which the court had already ruled admissible at that time, provided additional independent evidence that Whitaker kicked Burkheimer. The independent evidence relied on by the court sufficiently demonstrates a concert of action, with the various members of the group working together toward the single design of holding Burkheimer against her will. And it also sufficiently demonstrates that Whitaker was a member of the conspiracy.

¶ 61 Whitaker next contends the trial court decided the issue of his participation in the conspiracy using the wrong evidentiary standard.

¶ 62 In preparation for ruling on Whitaker's motion, the trial court reviewed *State v. Dictado,* 102 Wash.2d 277, 687 P.2d 172 (1984) and *State v. Guloy,* 104 Wash.2d 412, 419-20, 705 P.2d 1182 (1985). *Dictado* states that prior to admitting coconspirator statements, the trial court "must determine whether the State has shown, with substantial independent evidence, a prima facie case of conspiracy, and at least slight evidence of defendant's participation." *Dictado,* 102 Wash.2d at 283-84, 687 P.2d 172. However, *Guloy* made clear that *Dictado* is no longer good law for the proposition that slight evidence of the defendant's participation is sufficient. The proper standard is not slight evidence, but a preponderance of the evidence. *Halley,* 77 Wash.App. at 152 n. 5, 890 P.2d 511.

¶ 63 The trial court's oral ruling referred to Dictado's "slight evidence" language:

> First of all, I've already stated for the record that I am persuaded there is substantial evidence that there was a conspiracy at this time to kidnap Rachel. And that it was a continuing conspiracy. And then ultimately that conspiracy becomes a conspiracy to kill Rachel, and afterwards continues for purposes of disposing of evidence. In addition, *as stated in Dictado,*[2] *it requires at least slight evidence of the defendant's participation.* I would say based on the evidence available to the Court there is certainly more than slight evidence of Mr. Whitaker's participation in the kidnapping and later in the murder of

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[2] *State v. Dictado,* 102 Wash.2d 277, 284, 687 P.2d 172 (1984).

> Rachel Burkheimer. So I think that issue is established.[3]

Whitaker contends this excerpt from the court's ruling shows that the court committed reversible error by using the wrong standard.

¶ 64 The court's reference to "more than slight evidence" as opposed to "preponderance of the evidence" does not require reversal. As the State points out, the trial court in *Guloy* made no determination at all as to whether the defendant was a member of the conspiracy. The Supreme Court made its own determination that the record contained substantial evidence on that point. Our review of the record in this case similarly shows there was substantial evidence of Whitaker's participation at the duplex in the plan to hold Burkheimer against her will.

¶ 65 Finally, an erroneous evidentiary ruling is harmless unless, within reasonable probabilities, it affected the outcome of the trial. *State v. Thomas,* 150 Wash.2d 821, 870, 83 P.3d 970 (2004). Jihad's statement that Whitaker kicked Burkheimer when she was down was merely duplicative of what Williams and White said. Even if Jihad's statement should have been excluded as hearsay, evidence of the kick was before the jury. Any error was harmless.

CRAWFORD

¶ 66 Whitaker next contends the trial court admitted several testimonial hearsay statements in violation of *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158

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[3] Report of Proceedings (6/9/2004) at 1209-1210 (emphasis added).

L.Ed.2d 177 (2004). One of his citations is to the portion of the record in which Rivas testifies about Jihad telling him Whitaker kicked and bound Burkheimer. As noted above, the court admitted these statements as statements in furtherance of a conspiracy. Such statements are not barred by *Crawford* because they are not testimonial. *Crawford,* 541 U.S. at 56, 124 S.Ct. 1354.

¶ 67 Whitaker calls attention to portions of the record consisting of Jihad's statements to the police and the FBI. None of these excerpts show that the jury heard testimony about statements made by Jihad to law enforcement. Instead, the transcript shows argument outside the presence of the jury – for example, where the lawyers are arguing about the coconspirator exemption,[4] or where defense counsel is seeking to introduce part of Jihad's statement to law enforcement.[5]

¶ 68 The court had transcripts of Jihad's statements to law enforcement admitted "for my purposes", and had them marked with pretrial numbers. Whitaker offers nothing more than speculation that this evidence reached the jury. Because he has not identified testimonial hearsay that reached the jury, his *Crawford* argument is unsupported.

¶ 69 At oral argument before this court, Whitaker introduced an argument that *Crawford* prohibits a judge from relying on testimonial hearsay to determine whether coconspirator statements are sufficiently reliable to be admitted under ER 801(d)(2)(v). As he has offered no

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[4] Report of Proceedings (6/09/2004) at 1207-09, 1211, 1214.

[5] Report of Proceeding (6/14/2004) at 1759-70.

authority for his late-adopted position, we do not consider it.

GRUESOME PHOTOGRAPHS

¶ 70 Whitaker moved to exclude 13 autopsy photographs as unfairly prejudicial. He contends the court erred by denying this motion.

¶ 71 Accurate photographic representations are admissible, even if gruesome, if their probative value outweighs their prejudicial effect. *State v. Crenshaw,* 98 Wash.2d 789, 806, 659 P.2d 488 (1983). A bloody, brutal crime cannot be explained to a jury in a lily-white manner. *State v. Adams,* 76 Wash.2d 650, 656, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971). The State may present "ample evidence" to prove every element of the crime. Even so, prosecutors do not have "carte blanche to introduce every piece of admissible evidence" when the cumulative effect of that evidence is inflammatory and unnecessary. *Crenshaw,* 98 Wash.2d at 807, 659 P.2d 488; *see State v. Sargent,* 40 Wash.App. 340, 698 P.2d 598 (1985) (abuse of discretion to admit four autopsy photographs when only one helped to show premeditation, and testimonial evidence and diagrams could have revealed the same information in a nonprejudicial manner).

¶ 72 The admission of autopsy photographs is in the sound discretion of the trial court. *State v. Lord,* 117 Wash.2d 829, 870, 822 P.2d 177 (1991). Photographs have probative value where they are used to illustrate or explain the testimony of the pathologist performing the autopsy. *Lord,* 117 Wash.2d at 870, 822 P.2d 177. Unless it is clear from the record that the primary reason to admit

gruesome photographs is to inflame the jury's passion, appellate courts will uphold the decision of the trial court. The law requires an exercise of restraint, not a preclusion simply because other less inflammatory testimonial evidence is available. *State v. Stackhouse,* 90 Wash.App. 344, 357, 957 P.2d 218 (1998).

¶ 73 Here, the State questioned prospective jurors during voir dire regarding their ability to deal objectively with gruesome autopsy photographs. The State proposed to admit 15 out of the 77 available autopsy photographs. Whitaker objected to 13 of them and argued that admission of the photographs would violate ER 403 because the doctor could explain the autopsy just as well with diagrams. The trial court held a hearing outside the presence of the jury so that Dr. Thiersch, the medical examiner, could identify the relevance of the 15 photographs to his testimony. The doctor said they were representative of the injuries on Burkheimer's body and would help explain the relationships between the various injuries. For instance, the pictures of the face show that the bruising could not have come from only one blow.

¶ 74 In the doctor's opinion, the death was a homicide caused by gunshot wounds to the head. He said he could explain this opinion with diagrams, but they would not convey as much information as photographs. The actual appearance of the wounds was relevant to his determination that the death was a homicide, because they suggest the gun was fired from a distance inconsistent with suicide. The appearance of the gunshot wounds also helps to explain which are entrance wounds and which are exit wounds. They show that the injuries occurred near the same time and while Burkheimer was alive. The decomposition and skin slippage helped show

that the body had been in a grave for a long time. The appearance of the wounds also helped to establish the direction of the gunfire and to show that Burkheimer was lying face down when killed.

¶ 75 The court denied the motion to exclude. The court found that the pictures would be more supportive of the doctor's testimony than a drawing telling them what he saw, especially given the jurors' inexperience with what was being represented. The court noted that the doctor's manner was clinical, not inflammatory. The court ruled that while the decomposition of the body made the pictures more disturbing to look at, that was a fact of the case. The court found the photographs "extremely useful in explaining Dr. Thiersch's opinions, and in corroborating testimony of other individuals in this case".

¶ 76 The photographs, which are part of the record, are indeed gruesome and disturbing. But a reasonable person could conclude as the trial court did, that jurors would better understand the doctor's testimony with photographs than they would with diagrams. A medical examiner's testimony that the photographs will be helpful is a factor supporting admissibility. *See, e.g., State v. Elmore,* 139 Wash.2d 250, 285, 985 P.2d 289 (1999) ("it cannot be said the trial court abused its discretion in admitting the autopsy photographs given the medical examiner's testimony that such slides would aid the jury in understanding his testimony"). A defendant may not "sanitize the events of a brutal crime by dictating what evidence of the victim's death the State is entitled to present." *Elmore,* 139 Wash.2d at 285, 985 P.2d 289. We conclude the trial court did not abuse its discretion.

ACCOMPLICE LIABILITY INSTRUCTION

¶ 77 Whitaker next contends the court's accomplice liability instruction violated the *Cronin-Roberts* rule.[6] That rule requires accomplice instructions to require proof that the defendant knew his actions would promote *the* crime charged, rather than any potential crime.

¶ 78 The trial court instructed the jury as follows:

> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
>
> A person is an accomplice in the commission of the crime of murder in the first degree if, with knowledge that it will promote or facilitate the commission of that crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.

This is the language required by *Cronin* and *Roberts*.

¶ 79 Whitaker contends the first sentence, which contains the phrase "a crime", relieved the State of its burden of proving his knowledge of "the" crime. But the first sentence does not relate to the defendant's knowledge. It relates to his location. The instruction does not relieve the State of its burden to prove knowledge of "the" crime.

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[6] *State v. Cronin*, 142 Wash.2d 568, 578, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wash.2d 471, 510-513, 14 P.3d 713 (2000).

FIRST DEGREE MURDER TO-CONVICT INSTRUCTION

¶ 80 Instruction 12, the to-convict instruction, allowed the jury to convict Whitaker for first degree murder as an accomplice:

> To convict the defendant of the crime of murder in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> . . .
>
> (2) That the defendant or a person to whom he was an accomplice acted with intent to cause the death of Rachel Rose Burkheimer;
>
> (3) That the intent to cause the death was premeditated.

Whitaker challenges elements (2) and (3) in the court's to-convict instruction for the murder charge. He contends the instruction should have required the State to prove that Whitaker himself had the intent to kill Burkheimer, and that his own intent to kill was premeditated.

¶ 81 A person is guilty of a crime if he is an accomplice of the person that committed the crime. RCW 9A.08.020. A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020. An accomplice need not "have specific knowledge of every element of the crime nor share the same mental state as the principal." *State v. Berube,* 150 Wash.2d 498, 511, 79 P.3d 1144 (2003).

¶ 82 The to-convict instruction in this case satisfied the statute by requiring the State to prove that Whitaker

acted with knowledge he was aiding a premeditated murder.

¶ 83 As Whitaker points out, the same instruction was held inadequate in *Roberts*. But it was held inadequate for imposition of the death penalty, not for conviction of first degree murder. *State v. Roberts,* 142 Wash.2d at 505, 14 P.3d 713. *Roberts,* therefore, does not support Whitaker's argument.

MAJOR PARTICIPANT

¶ 84 Both sides raise issues arising out of the court's inclusion of "major participant" language in the instructions that allowed the jury to convict Whitaker of aggravated murder. Conviction for aggravated murder requires proof of an aggravating factor, and allows no punishment less than life in prison without possibility of any parole. Here, the State alleged as aggravating factors that the murder was committed in the course of, in furtherance of, or in immediate flight from (1) robbery in the first degree or, alternatively, (2) kidnapping in the first degree. Instruction 15 required the jury to find, as well, that Whitaker himself was a "major participant" in the acts that caused Burkheimer's death:

If you find the defendant guilty of premeditated murder in the first degree as defined in instruction 12, you must then determine whether any of the following aggravating circumstances exist:

> The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree *and the defendant was a major participant in the acts which caused the death of Rachel Burkheimer* and the

> defendant was a major participant in the robbery in the first or second degree.[7]

The other aggravating factor instruction and the verdict form mirrored this "major participant" language.

¶ 85 Whitaker appeals the court's failure to define "major participant", something he did not request below, and argues that the term is unconstitutionally vague. The State responds that if major participation language is required, Whitaker's argument is barred by invited error. The State also contends major participation language is not required in an aggravated murder case where the State is not seeking the death penalty.

¶ 86 We reject the State's contention that Whitaker's claim is barred by invited error. The trial court asked both parties to propose a "major participant" instruction. Whitaker's counsel proposed the language used in the court's instruction: "major participant in the acts which caused the death of Rachel Burkheimer."[8] However, Whitaker is not arguing on appeal that it was error to include this language. Rather, he is arguing that once the court decided to include "major participant" language, the court erred by failing to define "major participant."

¶ 87 Whitaker did not object before the verdict to the lack of definition of the term, nor did he propose a definition. While the constitution requires that the jury be instructed as to each element of the offense charged, definition of those elements is not a constitutional requirement. *State v. Scott,* 110 Wash.2d 682, 689, 757 P.2d

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[7] Clerk's Papers at 105 (emphasis added).

[8] Report of Proceedings (6/16/2004) at 2274.

492 (1988). A criminal defendant who feels the prosecution's case is weak on one of the elements may so argue to the jury or advance a well crafted instruction. The defendant may not raise the absence of a definitional instruction for the first time on appeal. *Scott,* 110 Wash.2d at 691, 757 P.2d 492.

¶ 88 The closest Whitaker came to proposing a definition was in arguing that the jury should be instructed to find "that the defendant personally committed the robbery in the first or second degree or personally committed kidnapping in the first degree."[9] But this instruction misstates the law. A requirement that a defendant personally commit the underlying offense would rule out accomplice liability for aggravated murder. *Roberts* did not rule out accomplice liability for aggravated murder. *Roberts* held that when the aggravated murder to be punished by death is committed via accomplice liability, major participation by the defendant is required. Whitaker's failure to propose a defining instruction that correctly stated the law precludes him from arguing on appeal that the absence of such an instruction was error.

¶ 89 We further reject Whitaker's contention that we should use a due process vagueness analysis in evaluating his claim that the trial court should have given an instruction he did not request. Vagueness analysis is employed to ensure that ordinary people can understand what conduct is proscribed, and to protect against arbitrary enforcement of law. *See City of Bellevue v. Lorang,* 140 Wash.2d 19, 30, 992 P.2d 496 (2000). This rationale applies to statutes and official policies, not to jury instructions. Unlike citizens

[9] Report of Proceedings (6/17/2004) at 2295.

who must try to conform their conduct to a vague statute, a criminal defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction. Following *Scott,* we conclude that Whitaker's failure to propose a definition of "major participant" precludes review of his claim of error.

¶ 90 The State's appeal urges that Instruction 15 imposed upon the State a higher burden than the law requires. The State contends that only in a capital case is the State required to prove that the defendant was a major participant in the acts that caused the death.

¶ 91 When a jury finds aggravating factors in a murder case and decides to impose the death penalty, and the finding of guilt on the underlying murder charge is based on accomplice liability, the jury must find the accused was a major participant in the homicidal acts:

> The "to convict" and aggravating factors instructions were erroneous in conjunction with one another because they "allow a defendant to be sentenced to death without a showing that he or she personally caused the victim's death or was a major participant in the homicidal acts."

State v. Thomas, 150 Wash.2d at 842, 83 P.3d 970 (quoting *Roberts,* 142 Wash.2d at 506, 14 P.3d 713). *Thomas* was procedurally identical to *Roberts:* a jury, possibly employing accomplice liability, convicted the defendant of aggravated murder when the instructions did not include a major participation requirement, and a death sentence was imposed. The Supreme Court upheld the conviction but reversed the death sentence. The problem then was to define the options available to the trial court on remand.

¶ 92 The court considered whether Thomas could, on remand, simply be resentenced to life without possibility of parole-the only sentence available, short of death, for an aggravated murder conviction. The court decided a "life without" sentence was not an option, and remanded for either a new trial on aggravated murder or resentencing on first-degree murder:

> Under *Apprendi*[10] and *Ring*[11] the jury must decide whether the aggravating factors have been proved beyond a reasonable doubt for Thomas to be sentenced to either life in prison without the possibility of parole or death because both of these sentences are more severe than life with the possibility of parole.

Thomas, 150 Wash.2d at 849, 83 P.3d 970. The court held the omission of the major participant language in the aggravating factor instruction was an error that could not be harmless.

¶ 93 The conclusion that "major participant" language had to be included in the instructions for Whitaker's aggravated murder case even though no death penalty was sought appears to be compelled by the analysis in *Thomas.* Had the *Thomas* court believed that "major participant" language in the instructions was required only for death cases, Thomas could have been resentenced to life in prison without parole. There would have been no reason to decide whether harmless error was available to affirm the

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[10] *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[11] *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

aggravated murder conviction but not the death penalty, if no error occurred in the first place.

¶ 94 We nevertheless acknowledge the persuasive force of the State's argument that it would not have been error to omit the language in this case where the death penalty was not at stake. The cases from which the requirement originates derive it from the 8th Amendment as that amendment relates to the constitutionality of the death penalty. *See* cases discussed in *Roberts,* 142 Wash.2d at 502-03, 14 P.3d 713.

¶ 95 If the analysis in *Thomas* is flawed as the State's position suggests, there has been no prejudice to the State in the present case. Even if the burden imposed by Instruction 15 was unnecessarily high, the jury found the State met it. In view of our decision to affirm the conviction and sentence, it is unnecessary to decide the State's cross-appeal.

STATEMENT OF ADDITIONAL GROUNDS

¶ 96 In a pro se statement of additional grounds for review, Whitaker contends the State's evidence was insufficient to prove either the murder or conspiracy charges. But, when viewed in the light most favorable to the State, the circumstances here show that Whitaker played a major role in nearly every stage of Burkheimer's murder. The evidence is sufficient.

¶ 97 The jury was instructed that a person is not an accomplice if he terminates his complicity prior to the commission of the crime and makes a good faith effort to prevent the commission of the crime. In an effort to prove that he made a good faith effort to prevent the killing,

Whitaker testified that he asked Anderson not to kill Burkheimer. In closing, the prosecutor argued that Whitaker's claim to have asked Anderson not to kill Burkheimer was unsupported by the testimony of other witnesses. Whitaker contends this statement was misconduct because it shifted the burden of proof. We disagree. The prosecutor merely pointed out that Whitaker's claim contradicted the accounts of other eyewitnesses. The prosecutor also argued that, given the circumstances, merely asking Anderson not to kill Burkheimer would not be enough to constitute a good faith effort to prevent the commission of the crime. What constituted a good faith effort was a question for the jury, and the prosecutor was entitled to argue what might and might not constitute such an effort. The prosecutor did not commit misconduct.

¶ 98 Affirmed.

WE CONCUR: SCHINDLER and APPELWICK, J.J.

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. WHITAKER, JOHN ALAN Defendant. SID:WA19374161 If no SID, use DOB: 09/07/1980	No. 02-1-02368-6 JUDGMENT AND SENTENCE [X] Prison [ ] Jail One Year or Less [ ] First Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [X] Clerk's Action Required, restraining order entered para. 4.3 [X] Clerk's action required firearms rights revoked, para. 4.3 and 5.6 [ ] Clerk's action required, para 5.4 Restitution Hearing set. (Filed Jul. 23, 2004)

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on June 21, 2004 by jury – verdict of:

COUNT	CRIME	RCW	INCIDENT #	DATE OF CRIME
I	Aggravated First Degree Murder (firearm enhancement)	9A.32.030(1)(a) & 10.95.020(11)	SSO, 0220614	9/23/02
II	Conspiracy to Commit First Degree Murder	9A.28.040 & 9A.32.030(1)(a)	SSO, 0220614	9/23/02

as charged in the Amended Information.

[ ] Additional current offenses are attached in Appendix 2.1.

[X] A special verdict/finding for use of a deadly weapon which was a firearm was returned on Count(s) I RCW 9.94A.602, 510.; 9.41.010.

[ ] A special verdict/finding for use of deadly weapon which was not a firearm was returned on Count(s) ___. RCW 9.94A.602,510.

[ ] A special verdict/finding of sexual motivation was returned on Count(s) ___. RCW 9.94A.835.

[ ] A special verdict/finding for Violation of the Uniform Controlled Substances Act was returned on Count(s) ___, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter.; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public

housing project designated by a local governing authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) ___ RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.

[ ] The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030(45)

[ ] This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in Chapter 9A.40RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a chemical dependency which contributed to the offense and imposes as a condition of sentence that defendant shall participate in the rehabilitative program/affirmative conduct: _____

_____.

RCW 9.94A.607.

[ ] The crime charged in Count(s) ___ involve(s) domestic violence.

[ ] The offense in Count(s) ___ was committed in a county jail or state correctional facility. RCW 9.94A.510(5).

[ ] The court finds that in Count ___ a motor vehicle was used in the commission of this felony. The Department

of Licensing shall revoke the defendant's driver's license. RCW 46.20.285.

[X] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): Counts I and II.

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv	TYPE OF CRIME
1					

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERI-OUS. LEVEL	STAN-DARD RANGE (not including enhance-ments)	PLUS EN-HANCE-MENTS	TOTAL STANDARD RANGE (including enhance-ments)	MAXI-MUM TERM
I	0	XVI	Life	60 months	Life	Life
II	0	XV	180-240 months	N/a	180-240 months	Life

*Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile Present

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [ ] **EXCEPTIONAL SENTENCE [For Determinate Sentence]**. Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] within [ ] below the standard range for Count(s) ___. Findings of fact and conclusions of law are attached in Appendix 2.4. The prosecuting attorney [ ] did [ ] did not recommend a similar sentence.

[ ] **EXCEPTIONAL MINIMUM TERM [For Maximum and Minimum Term Sentence]** Substantial and compelling reasons exist which justify an exceptional minimum term [ ] above [ ] within [ ] below the standard range for Count(s) ___. Findings of fact and conclusions of law are attached in Appendix 2.4. The prosecuting attorney [ ] did [ ] did not recommend a similar sentence.

2.5 [ ] ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142): _____

2.6 The prosecutor's recommendation was * months/days on Count 1, 240 months/days on Count 2, ___ months/days on Count 3, ___ months/days on Count 4. The prosecutor recommended counts I & II run concurrently/~~consecutively~~.
* Life in prison without parole.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts _____

3.3 [ ] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

	$7629.67	Restitution to: Crime Victim's Compensation Fund (see restitution order)	
JASS CODE	$___	Restitution to: _____	
RTN/RJN	$___	Restitution to: _____ (Name and Address – address may be withheld and provided confidentially to Clerk's Office).	
RMA	$15/$25/ $50	Restitution Monitoring Fee The Clerk shall collect this fee before collecting restitution or any other assessed legal financial obligations.	SCC 4.94.010 RCW 9.94A.760
PCV	$100/ $500	Victim Assessment $100.00 crimes committed prior to June 6, 1996. $500.00 crimes committed on or after June 6, 1996.	RCW 7.68.035
CRC	$Waived [N/A]	Court costs, including Criminal filing fee $___ FRC Witness costs $___ WFR Sheriff service fees $___ SFR/SFS/SFW/SRF Jury demand fee $___ JFR Other $___	RCW 9.94A.030, 9.94A.505, 10.01.160, 10.46.190

PUB	$~~780~~ waived	Fees for court appointed attorney	RCW 9.94A.030
PUB	$~~790,620,530~~	Fees for all appointed conflict cases	RCW 9.94A.030
WFR	$___	Court appointed defense expert and other defense costs	RCW 9.94A.030
FCM	$___	Fine RCW9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/ FCD/NTF/ SAD/SDI	$___	Drug enforcement fund of _____	RCW 9.94A.030
CLF	$___	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
EXT	$___	Extradition costs	RCW 9.94A.505
	$___	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)	RCW 38.52.430
	$~~100~~ waived	Biological Sample Fee	RCW 43.43.7541
	$___	Domestic Violence Penalty (Post 6/4/04 – $100 maximum)	RCW 10.99.080
	$___	Other costs for: _____	
	$8,129.67	TOTAL	RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753.

[ ] RESTITUTION. Schedule attached, Appendix 4.1.

[ ] Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount – $)

RJN _____

_____

_____

[ ] The Department of Corrections may immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here: Not less than

$_____ per month commencing _____. RCW 9.94A.760

All payments shall be made within _____ months of: [ ] release of confinement; [ ] entry of judgment; [X] Other To be set by Department of Corrections

[ ] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760

[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[ ] The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgment. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 3020 Rucker, Suite 206, Everett, WA 98201 within one (1) hour of this order to arrange for the test. RCW 70.24.340

[X] DNA TESTING. The defendant shall have a biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

4.3 The defendant shall not have contact with Denise Webber (9/19/54), William Burkheimer (4/5/52), Meghan Burkheimer (2/21/81) (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence). EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY

TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.

[ ] (Check for any domestic violence crime as defined by RCW 10.99.020(3)): VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST. ANY ASSAULT, DRIVE-BY SHOOTING, OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY. RCW 10.99.050.

[X] (Check for any harassment crime as defined by RCW 9A.46.060): VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 9A.46 AND WILL SUBJECT A VIOLATOR TO ARREST. RCW 9A.46.080.

[ ] (For Domestic Violence orders only:) The clerk of the court shall forward a copy of this order on or before the next judicial day to the _____ County Sheriff's Office or _____ Police Department (where the protected person above-named lives), which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

4.4 OTHER: The defendant shall also have no contact with Tony Williams (7/11/82), Jeffrey Barth (10/17/80), Maurice Rivas (5/10/84), Matthew Durham (2/13/85), Nathan Lovelace (9/3/86).

4.5 **CONFINEMENT OVER ONE YEAR.**

CONFINEMENT [Determinate Sentences]. Defendant is sentenced to the following terms of total confinement in the custody of the Department of Corrections (DOC):

Life in prison without Parole months on Count I
240 months on Count II
_____ months on Count ___
_____ months on Count ___
The defendant shall also serve 5 years (60 months) for the firearm enhancement on Count I

CONFINEMENT [Maximum Term And Minimum Term]. Defendant is sentenced to total confinement as follows. The maximum and minimum terms of confinement shall be served in a facility or institution operated, or utilized under contract, by the State of Washington.

Count ___: maximum term of ___ years AND minimum term of ___ months

Count ___: maximum term of ___ years AND minimum term of ___ months

Count ___: maximum term of ___ years AND minimum term of ___ months

Count ___: maximum term of ___ years AND minimum term of ___ months

FURTHER PROVISIONS APPLICABLE TO ALL SENTENCES:

The minimum term of actual total confinement ordered on all counts cumulatively is _____ (Add mandatory firearm and deadly weapon enhancement time to run consecutively to other counts. See Sec. 2.3, Sentence Data above.)

The maximum term of total confinement ordered on all counts cumulatively is Life without Parole.

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at

Section 2.3, and except for the following counts which shall be served consecutively: The 5 years (60 months) for the firearm enhancement to Count I shall be served consecutively to Counts I & II.

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence immediately unless otherwise set forth here: _____

_____

The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.6 [ ] **COMMUNITY PLACEMENT [For Determinate Sentences]** is ordered as follows: Count ___ for ___ months; Count ___ for ___ months; Count ___ for ___ months.

[X] **COMMUNITY CUSTODY RANGE [For Determinate Sentences]** is ordered as follows: Count I for a range from 24 to 48 months; Count II for a range from 24 to 48 months; Count ___ for a range from ___ to ___ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses – serious violent offense, second degree assault, any crime against a person with a deadly weapon finding. Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex

offense – RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

[ ] COMMUNITY CUSTODY [For Maximum and Minimum Term Sentences]: For each count, the defendant is sentenced to community custody under the supervision of the Department of Corrections (DOC) and the authority of the Indeterminate Sentence Review Board for any period of time that the defendant is released from total confinement before expiration of the maximum sentence. In addition to other conditions, the defendant shall comply with any conditions imposed by the Indeterminate Sentence Review Board under RCW 9.94A.713; 9.95.420, .425, .430, .435.

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[ ] Defendant shall have no contact with : _____

_____

[ ] Defendant shall remain [ ] within [ ] outside of a specific geographical boundary, to wit: ____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services:

_____

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

_____

4.7 [ ] **WORK ETHIC CAMP**. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the

defendant while under the supervision of the County Jail or Department of Corrections:

_____

_____

4.9 Unless otherwise ordered, all conditions of this sentence shall remain in effect notwithstanding any appeal.

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A753(4); RCW 9.94A.760 and RCW 9.94A.505(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

[ ] Defendant waives any right to be present at any restitution hearing (sign initials): ___

[ ] Defendant waives any right to a restitution hearing within 6 months RCW 9.94A.750

[ ] A restitution hearing shall be set for _____

The Prosecutor shall provide a copy of the proposed restitution order and supporting affidavit(s) or victim(s) 21 judicial days prior to the date set for said restitution hearing. The defendant's presence at said restitution hearing may be excused only if a copy of the proposed restitution order is signed by both defendant and defense counsel and returned to the Court and Prosecutor no later than 10 judicial days prior to said hearing.

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

Cross off if not applicable:

5.6 **FIREARMS**. You may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047

If this is a crime enumerated in RCW 9.41.040 which makes you ineligible to possess a firearm, you must surrender any concealed pistol license at this time, if you have not already done so.

(Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court. The Clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the department of licensing along with the date of conviction).

~~5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION**. RCW 9A.44.130,10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.~~

~~If you leave the state following your sentencing or release from custody but later move back to Washington,~~

~~you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this State's Department of Corrections.~~

~~If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.~~

~~If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.~~

~~Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of~~

~~release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level. If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.~~

Cross off if not applicable:

5.8 RIGHT TO APPEAL. If you plead not guilty, you have a right to appeal this conviction. If the sentence imposed was outside of the standard sentencing range, you also have a right to appeal the sentence.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

5.9 OTHER: _____

_____

_____

_____

DONE in Open Court and in the presence of the defendant this date: July 22, 2004.

/s/ Linda C. Krese
JUDGE
Print name: Linda C. Krese

/s/ Julie A. Mohr
~~MICHAEL T. DOWNES, #12022~~
Deputy Prosecuting Attorney 25528
JULIE A. MOHR

/s/ John R. Muenster
JOHN R. MUENSTER, #
Attorney for Defendant
[Illegible]

OPPOSITION AND OBJECTIONS NOTED:
/s/ Signature Waived
JOHN ALAN WHITAKER
Defendant Denied

Interpreter signature/Print name: _____
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case: 02-1-02368-6

I, Pam L. Daniels, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, _____, Deputy Clerk.

IDENTIFICATION OF DEFENDANT

SID No. WA19374161 (If no SID take fingerprint card for State Patrol) Date of Birth: 09/07/1980

FBI No. 63046NB6 Local ID No.

PCN No. _____ DOC _____

Alias name, SSN, DOB: JOHN ALLEN WHITAKER September 7 1980, JOHNIE A WHITAKER September 7 1980, JON A WHITAKER September 7 1980.

Race: White Ethnicity: [ ] Hispanic [ ] Non-Hispanic Sex: M

Height: 5'10 Weight: 155 Hair: Brown Eyes: Brown

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court: [Signagture], Deputy Clerk. Dated: 7-22-04

DEFENDANT'S SIGNATURE John A. Whitaker
ADDRESS: C/O MUENSTER AND KORNIG, SUITE 2220,
1111 3RD AVE. SEATTLE, WA. 98101

[Fingerprints Omitted In Printing]

ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Correction Center of the State of Washington, GREETINGS:

WHEREAS, JOHN ALAN WHITAKER, has been duly convicted of the crime(s) of Count 1 Aggravated First Degree Murder, Count 2 Conspiracy to Commit, as charged in the Amended Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the terms(s) as provided in the judgment which is incorporated by reference, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof. Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to conduct him to the Washington Corrections Center at Shelton, Washington, in Mason County, and this is to command you, the said Superintendent and Officers

in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presents shall be authority for the same. HEREIN FAIL NOT.

WITNESS the Honorable Linda C. Krese, Judge of the said Superior Court and the seal thereof, this 22nd day of July, 2004.

Pam L. Daniels
CLERK OF THE SUPERIOR COURT
By: /s/ [Signature]
Deputy Clerk

157 P.3d 404 (Table)

State v. Whitaker
Wash. 2007

(The Court's decision is referenced in a Pacific Reporter table captioned "Supreme Court of Washington Table of Petitions for Review.")

Supreme Court of Washington State

v.

John A. Whitaker
NO. 78969-0

April 04, 2007

Appeal from: 54834-4-I, 133 Wash.App. 199, 135 P.3d 923

Petition for Review: Denied.

(2)

No. 07-18

In The Supreme Court of the United States

John A. Whitaker,

Petitioner,

v.

WASHINGTON,

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Washington

BRIEF IN OPPOSITION TO CERTIORARI

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Counsel of Record

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JURISDICTION

This Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The petitioner was a member of a gang who called themselves the Northwest Mafia. Their purpose was to obtain money primarily through stealing from drug dealers. The gang also included Matthew Durham, Maurice Rivas, John Anderson, Yusif Jihad, Jeff Barth and Tony Williams. TR 524-530, 1025-1031, 1432-1435.

The petitioner, Anderson, and Jihad developed the belief that Rachel Burkheimer had set them up to be injured by a rival. Anderson and Jihad devised a plan to lure her to Jihad's home. Whitaker and other gang members were present when Burkheimer arrived. As she tried to leave, Anderson threw her to the ground and Whitaker kicked her. Anderson and Whitaker then bound her with duct tape. She was eventually taken to the garage where she was held for several hours. TR 540-552, 755-757,765-772, 803-804, 1049-1050, 1060-1063, 1216-1217, 1477-1478.

Rivas arrived while Ms. Burkheimer was being held in the garage. Once Rivas was there Jihad explained to him what had happened, including the fact that Whitaker had participated by kicking and binding Ms. Burkheimer. Jihad told Rivas that he was "in it now." The gang members discussed various plans for Ms. Burkheimer including holding her for ransom. TR 555, 776, 1064-1077, 1219-1221.

Jihad lived with his girlfriend Trissa Conner. Eventually Ms. Conner came home. When she learned Ms. Burkheimer was being held captive in her garage, Ms. Conner first threatened to call the police. She then ordered everyone out of the house. Gang members rapidly prepared to leave. Whitaker and Anderson used a large gym bag to conceal Ms. Burkheimer as they carried her out of the house. Whitaker, Rivas, and Durham then drove away with Ms. Burkheimer concealed in the bag in the back of their Jeep. TR 867, 877, 884-891, 970, 1089-1093.

Eventually Whitaker called Anderson and Jihad. After speaking to them, Whitaker directed Durham to pull over to a wooded area. He ordered Rivas to stay with Ms. Burkheimer until they returned. Whitaker and Durham returned to Jihad's duplex where Anderson joined them with shovels and picks. The three men then returned to retrieve Rivas and Ms. Burkheimer. TR 792-796, 1097-1106, 1110.

The four men drove Ms. Burkheimer up to a secluded spot. Whitaker, Anderson, and Rivas dug her grave. Ms. Burkheimer was ordered out of the bag. She was told to remove all her clothing and jewelry and get in the grave. Whitaker collected Ms. Burkheimer's things and then placed them in a bag, which they later attempted to destroy. Anderson then shot Ms. Burkheimer to death. TR 806, 820, 1115-1128, 1228-1235.

Several days later police found Ms. Burkheimer's body. When they found out, Jihad, Whitaker and Barth fled to Los Angeles. There they were arrested for the murder. Jihad made a statement to police, including the fact that Whitaker had kicked and bound Ms. Burkheimer after Anderson had attacked her. TR 730-743, 1203-1204, 1209-1211, 1494-1495, 1503-1506.

The petitioner was incarcerated prior to trial. While awaiting trial the petitioner struck up a friendship with another inmate, Christian White. The petitioner told White about his involvement with Ms. Burkheimer's death, including the fact he had kicked and bound her during the course of the kidnapping. TR 1564-1566, 1573-1578.

At trial the State sought to introduce evidence through Rivas that Jihad had told Rivas what Whitaker had done before Rivas had arrived. Rivas testified that Jihad told him that Whitaker had kicked Rachel and bound her after Anderson knocked her down. The court considered the motion outside the presence of the jury. The trial court found the petitioner was part of a conspiracy to kidnap and murder Ms. Burkheimer, and Jihad's statements were made in furtherance of that conspiracy. The court relied on evidence that had already been introduced, the testimony of White which had been ruled admissible, and Jihad's statement to police. The court then ruled the evidence was admissible. TR 1200-1212.

The petitioner was convicted of Aggravated First Degree Murder and Conspiracy to Commit Murder First Degree for the kidnap and murder of Rachael Burkheimer.

REASONS FOR DENYING THE PETITION

A. The Petitioner Did Not Raise The Issue To The Highest Court Of The State In Which A Decision Could Be Had.

The Supreme Court may review "final judgments or decrees rendered by the highest court of a State in which a decision could be had," where a claimed right or privilege is specially set up or claimed under the Constitution. 28 USC §1257(a). Here the

petitioner failed to present the precise issue on which he now seeks certiorari before the Washington State Supreme Court.

The petitioner briefed three arguments related to his Confrontation Clause claim in the Washington State Court of Appeals. He first argued the trial court erroneously concluded that a conspiracy exited and that the petitioner was part of that conspiracy. Second, he argued the trial court used the wrong evidentiary standard to determine if a conspiracy existed. Finally, he argued Jihad's statements regarding the petitioner kicking and binding Ms. Burkheimer was testimonial hearsay in violation of Crawford v. Washington, 541 U.S. 36 (2004).

The Court of Appeals addressed each of these three arguments and rejected them. The Court noted Jihad's statements to police were not admitted at trial, and his statements to Rivas were admissible as statements in furtherance of a conspiracy. For the first time at oral argument the petitioner argued that the trial court violated Crawford by relying on Jihad's statements to police to determine whether his statements to Rivas were admissible. The Court of Appeals declined to consider this issue because he had provided no authority for his late-adopted position. App. 23-26 to petitioner's brief.

The petitioner then petitioned for review to the Washington State Supreme Court. He did not raise any of the Confrontation Clause issues he had briefed in the Court of Appeals. Rather he sought review of the issue which the Court of Appeals declined to consider. He framed the issue as "The Trial Court Allowed the State to Use Statements Otherwise Inadmissible under Crawford to Justify Admitting the Statements of Alleged Co-Conspirators to Prove a Conspiracy." The State Supreme Court denied the petition for review.

In order to for this Court to review a decision from a State court, that decision must be final in the sense that it is not subject to further review or correction in any other state tribunal. Jefferson v. City of Tarrant, Ala., 522 U.S. 75, 81 (1997). Where a petitioner has not asked a State Supreme Court to review a judgment entered by the Court of Appeals of that state, the decision of the Court of Appeals does not qualify as a final judgment, and this Court lacks jurisdiction to review the issue. Banks v. California, 395 U.S. 708 (1969). Even though review by the Washington State Supreme Court was discretionary, the petitioner was obligated to raise the issue he seeks this Court to review with the State Supreme Court first. Matthews v. Huwe, 269 U.S. 262, 265 (1925), Stratton v. Stratton, 239 U.S. 55 (1915).

Here the petitioner did not follow that procedure. The issue raised in is petition is essentially the same Crawford issue he fully litigated in the Washington State Court of Appeals. However, because it was not the issue raised in the Supreme Court, that court had no opportunity to decide the issue he now asks this Court to decide. This Court has refused to consider issues not fully litigated in the highest court of a state in which a decision could be had. Illinois v. Gates, 462 U.S. 213, 223 (1983). Because the petitioner did not give the Washington State Supreme Court the opportunity to consider the issue presented here, this Court should deny his petition for lack of jurisdiction.

B. The Decision Of The Washington State Court Of Appeals Does Not Conflict With Decisions Of The Second Circuit Court Of Appeals Because Each Case Addressed Different Factual Circumstances.

Even if this Court accepts the petitioner's claim that this Court has jurisdiction to hear his case, the decision of the Washington Court of Appeals is not in conflict with decisions from

the Second Circuit Court of Appeals. Here the Court of Appeals confirmed the trial court's determination that Jihad's statements to Rivas were made in the course of and in furtherance of a conspiracy to hold Ms. Burkheimer against her will and thus were admissible into evidence. App 26 to Petitioner's brief. This holding is consistent with this Court's decision in Crawford, 541 U.S. at 56 which said statements made in furtherance of a conspiracy are not testimonial.

The petitioner argues the Court of Appeals held that co-conspirator statements can never be testimonial pursuant to Crawford. He then argues this statement conflicts with United States v. Logan, 419 F.3d 172 (2nd Cir. 2005), cert denied, 126 S.Ct. 1067 (2006): and United States v. Stewart, 433 F.3d 273 (2nd Cir. 2006). The petitioner's position fails because the Court in his case addressed only the facts presented to it and did not attempt to address all possible circumstances. The courts in Logan and Stewart addressed the specific facts in those cases, and they are significantly different than those in petitioner's case.

Unlike the petitioner's case, the statement introduced into evidence in both Logan and Stewart was made to investigators or police who were investigating criminal activity. This fact is important in light of Davis v. Washington, 126 S.Ct. 2266 (2006). There this Court said statements to law enforcement personnel are "testimonial" under Crawford when there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions." Davis, 126 S.Ct. at 2274.

Unlike the statements at issue in either Logan or Davis, the statements at issue here were not made to police. Further, they were not intended to prove a past event that could relate to a future criminal prosecution. Rather, those statements were to another

person called in to participate in the crime. Courts have ruled similar statements were properly admitted because they furthered the conspiracy. United States v. Townley, 472 F.3d 1267, 1273 (10th Cir. 2007) citing United States v. Smith, 833 F.2d 213, 219 (10th Cir. 1987). (Statements which inform others of the current status of the conspiracy are "in furtherance" of the conspiracy), United States v. Yarbrough, 852 F.2d 1522, 1536 (9th Cir. 1988) (statements made to keep coconspirators abreast criminal acts committed by other coconspirators were in furtherance of a conspiracy.)

The defendant attempts to sidestep these differences by arguing Jihad described the completed crimes of assault and unlawful imprisonment. He argues that Davis stands for the proposition that statements made to non-law enforcement personnel are testimonial if they recount criminal events. The discussion in Davis that he relies on relates to circumstances under which the non-testifying declarant is a witness, not a coconspirator. Davis, 126 S.Ct. 2277. Davis and other cases which have followed Crawford have repeatedly reaffirmed that statements made in the course of and in furtherance of a conspiracy are not testimonial. See United States v. Delgado, 401 F.3d 290, 299 (5th Cir 2005), United States v. Bridgeforth, 441 F.3d 864, 869 n.1 (9th Cir 2006), United Sates v. Hansen, 434 F.3d 92, 100 (1st Cir 2006) cert denied, 127 S.Ct. 203 (2006), United States. v. Underwood, 446 F.3d 1340 (11th Cir. 2006), cert. denied, 127 S.Ct. 225 (2006)

The petitioner does not challenge the Court of Appeals determination that the evidence showed there was a conspiracy to hold Ms. Burkheimer against her will, petitioner was a member of that conspiracy, and Jihad's statements were made in furtherance of that conspiracy. He simply ignores the Court's holding. The facts determined by the Court of Appeals should not be ignored because they provide the foundation for admissibility of those

statements. As discussed, coconspirator statements made to coconspirators during the course of a conspiracy are not testimonial.

In contrast, the facts in the cases the petitioner cites from the Second Circuit justified a different result. In Logan the challenged statements from the co-defendant were admitted to corroborate the defendant's statement and the statements of other witnesses. They were not admitted for the truth of the matters asserted, and thus were not hearsay. Therefore, the Confrontation Clause was not violated. Logan, 419 F.3d at 178. Logan did reject the government's alternative argument that the statements were admissible as statements of a coconspirator. The Court confirmed that statements made by coconspirators in furtherance of a conspiracy were not testimonial. However, the Court distinguished that case on its specific facts; the statements in issue were made to police, and thus subject to Crawford's restrictions. Logan, 491 F.3d at 179.

Stewart characterized this latter discussion as dicta and distinguished it on its facts. Stewart, 433 F.3d at 293 n. 3. There the Court was faced with the question of whether coconspirators' truthful statements to investigators were admissible along with their untruthful statements when the parties were engaged in a conspiracy to obstruct an investigation. The Court held those truthful statements were testimonial. However, because those statements were designed to lend credence to false statements, and hence advance the conspiracy, they were admissible. Stewart, 433 F.3d at 292-293.

Just as Logan and Stewart addressed the particular facts presented in each of those cases, the Court of Appeals addressed the particular facts presented here. Each applied the same standard set out in Crawford and Davis to the facts presented to each court.

There is no conflict between the cases because of those factual differences. The petition should be denied because the petitioner has not credibly demonstrated that the decision of the Washington Court of Appeals is in conflict with either a decision of the Second Circuit Court of Appeals or this Court.

C. This Case Does Not Present Compelling Facts For Review Because Even If Error Had Been Committed, Introduction Of The Challenged Statements Were Not Critical To The Petitioner's Conviction.

The Washington Court of Appeals noted that any error in admission of Jihad's statements regarding the petitioner to Rivas would be harmless. The Court of Appeals relied on the fact that Rivas's testimony was duplicative of Williams and White's testimony. App. 25. The petitioner challenges this conclusion, arguing those witnesses was not credible. The challenge is purely speculative, however. Williams's overall testimony was corroborated by the other testifying coconspirators. There was no evidence that White and Williams knew each other. White also testified that Whitaker had admitted he arranged an alibi with another coconspirator. This testimony was confirmed by Rivas and Tyler Dockendorf, who acted as a courier between Whitaker and Rivas. TR 1244-1247, 1309-1315, 1579-1581.

Contrary to the petitioner's claim, no other jail inmate testified that he saw White going through the petitioner's legal papers before contacting police. The only reference to that suggestion came during a pre-trial hearing on the admissibility of his testimony when defense counsel asked White if he knew why an inmate named Marvin Nickell would say that White had done so. White stated he had not looked at the petitioner's legal papers and did not know why Nickell would say he did. Pre-trial TR (5/26/04) 210, 213-214. Nickell never testified at trial.

Additionally, the petitioner's claim that White received consideration on his own case in exchange for his testimony is unsupported by the record. TR 1567-1573.

Any error was also harmless because the evidence presented at trial overwhelmingly established the petitioner acted as an accomplice to the kidnapping and murder of Rachel Burkheimer from the beginning to the end. Durham confirmed the petitioner was present and aided in carrying Ms. Burkheimer into the garage after Anderson assaulted her. Durham and Rivas both testified Whitaker helped carry Ms. Burkheimer out of the garage and into the Jeep. Both said Whitaker directed where they went until they returned to pick up Anderson. Both confirmed Whitaker fully participated in digging Ms. Burkheimer's grave, carrying her to her grave, and taking her belongings from her before Anderson shot her. Both stated Whitaker helped bury Ms. Burkheimer and get rid of incriminating evidence. This evidence was corroborated by White's testimony recounting the petitioner's detailed admission of his part in Ms. Burkheimer's kidnap and murder. TR 1573-1578.

Considering the totality of the evidence the Court of Appeals correctly concluded that if any error occurred, it was harmless. Even if the petitioner's position had merit, this case does not present the best facts under which to decide the issue he raises. The evidence he complains was erroneously admitted had little impact on the outcome of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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